

JAMES G. KREISSMAN (Bar No. 206740)  
jkreissman@stblaw.com  
SIMONA G. STRAUSS (Bar No. 203062)  
sstrauss@stblaw.com  
SIMPSON THACHER & BARTLETT LLP  
2475 Hanover Street  
Palo Alto, California 94304  
Telephone: (650) 251-5000  
Facsimile: (650) 251-5002

JONATHAN K. YOUNGWOOD (admitted *pro hac vice*)  
jyoungwood@stblaw.com  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 455-2000  
Facsimile: (212) 455-2502

*Attorneys for Defendants  
Twitter, Inc., Richard Costolo and Anthony Noto*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DORIS SHENWICK, as Trustee for the DORIS  
SHENWICK TRUST, Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

TWITTER, INC., RICHARD COSTOLO and  
ANTHONY NOTO,

Defendants.

Case No. 3:16-CV-05314-JST

(Consolidated with 3:16-cv-05439-JST)

CLASS ACTION

**TWITTER DEFENDANTS'  
SUPPLEMENTAL REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
THEIR MOTION TO DISMISS  
PLAINTIFF'S CONSOLIDATED  
AMENDED COMPLAINT**

**Judge: Jon S. Tigar**

**Courtroom: 9**

**Hearing Date: October 5, 2017**

**Hearing Time: 2:00 P.M.**

**Date Action Filed: September 16, 2016**

Filed Jointly With: Reply Memorandum  
of Points and Authorities in Support of  
Twitter Defendants' Motion to Dismiss;  
Reply to Request for Judicial Notice

**TO THE COURT AND TO ALL PARTIES APPEARING IN THIS ACTION:**

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendants Twitter, Inc. (“Twitter”), Richard Costolo and Anthony Noto (collectively, the “Twitter Defendants”) respectfully request that the Court take judicial notice of the documents listed below and attached as exhibits hereto, in excerpted form as noted,<sup>1</sup> in support of the concurrently filed Reply Memorandum of Points and Authorities in Support of Twitter Defendants’ Motion to Dismiss Plaintiff’s Consolidated Amended Complaint.

1. Twitter’s Form 10-Q for the quarterly period ended March 31, 2014, as filed with the SEC on or about May 8, 2014 (“Q1 2014 10-Q”). A true and correct copy of relevant excerpts of the Q1 2014 10-Q is attached hereto as **Exhibit S**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

2. Twitter’s Form 10-Q for the quarterly period ended June 30, 2015, as filed with the SEC on or about August 7, 2015 (“Q2 2015 10-Q”). A true and correct copy of relevant excerpts of the Q2 2015 10-Q is attached hereto as **Exhibit T**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

3. Twitter’s Form 10-Q for the quarterly period ended September 30, 2015, as filed with the SEC on or about November 6, 2015 (“Q3 2015 10-Q”). A true and correct copy of relevant excerpts of the Q3 2015 10-Q is attached hereto as **Exhibit U**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

4. Twitter’s Form 10-Q for the quarterly period ended March 31, 2016, as filed with the SEC on or about May 3, 2016 (“Q1 2016 10-Q”). A true and correct copy of relevant excerpts of the Q1 2016 10-Q is attached hereto as **Exhibit V**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

5. Twitter’s Form 10-Q for the quarterly period ended June 30, 2016, as filed with the SEC on or about August 1, 2016 (“Q2 2016 10-Q”). A true and correct copy of relevant excerpts

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<sup>1</sup> To avoid unnecessary burden on the Court, the Twitter Defendants have provided only excerpts from Exhibits **S-X** and **CC-EE**, as these documents are voluminous. If the Court wishes to receive the entirety of any excerpted Exhibit, the Twitter Defendants will promptly furnish it.

of the Q2 2016 10-Q is attached hereto as **Exhibit W**. The entire quarterly report is accessible from the SEC's online "EDGAR" Database, available at <http://www.sec.gov>.

6. Twitter's Form 10-Q for the quarterly period ended September 30, 2016, as filed with the SEC on or about November 1, 2016 ("Q3 2016 10-Q"). A true and correct copy of relevant excerpts of the Q3 2016 10-Q is attached hereto as **Exhibit X**. The entire quarterly report is accessible from the SEC's online "EDGAR" Database, available at <http://www.sec.gov>.

7. A transcript of Twitter's July 29, 2014 Earnings Call for the quarterly period ended June 30, 2014 ("Q2 2014 Earnings Call"), available at <https://seekingalpha.com/article/2355785-twitters-twtr-ceo-dick-costolo-on-q2-2014-results-earnings-call-transcript>. A true and correct copy of the Q2 2014 Earnings Call is attached hereto as **Exhibit Y**. Plaintiff cites the Q2 2014 Earnings Call at paragraphs 26 and 85(i) of the Complaint.

8. A transcript of Twitter's October 27, 2015 Earnings Call for the quarterly period ended September 30, 2015 ("Q3 2015 Earnings Call"), available at <https://seekingalpha.com/article/3611236-twitters-twtr-ceo-jack-dorsey-q3-2015-results-earnings-call-transcript>. A true and correct copy of the Q3 2015 Earnings Call is attached hereto as **Exhibit Z**.

9. A transcript of Twitter's statements at a March 3, 2015 investor conference hosted by Morgan Stanley ("MS Investor Conference Statements"). A true and correct copy of the MS Investor Conference Statements is attached hereto as **Exhibit AA**. Plaintiff cites the MS Investor Conference Statements at paragraph 28, footnote 8; paragraph 87(h); and paragraph 103, footnote 43 of the Complaint.

10. A transcript of a November 6, 2013 speech given by then-Chairperson of the Securities and Exchange Commission Mary Jo White ("November 2013 Speech"), available at <https://www.sec.gov/news/speech/2013-spch110613mjwh.htm>. A true and correct copy of the November 2013 Speech is attached hereto as **Exhibit BB**. Plaintiff cites the November 2013 Speech at paragraph 118 of the Complaint.

11. Facebook, Inc.'s ("Facebook") Form 10-K for the annual period ended December 31, 2014, as filed with the SEC on or about January 29, 2015 ("FB 2014 10-K"). A true and correct copy of relevant excerpts of the FB 2014 10-K is attached hereto as **Exhibit CC**. The

entire annual report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

12. Facebook’s Form 10-Q for the quarterly period ended March 31, 2015, as filed with the SEC on or about April 23, 2015 (“FB Q1 2015 10-Q”). A true and correct copy of relevant excerpts of the FB Q1 2015 10-Q is attached hereto as **Exhibit DD**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

13. Snap Inc.’s (“Snap”) Form 10-Q for the quarterly period ended March 31, 2017, as filed with the SEC on or about May 10, 2017 (“Snap Q1 2017 10-Q”). A true and correct copy of relevant excerpts of the Snap Q1 2017 10-Q is attached hereto as **Exhibit EE**. The entire quarterly report is accessible from the SEC’s online “EDGAR” Database, available at <http://www.sec.gov>.

### **ARGUMENT**

The Court may consider Exhibits S through EE when ruling on the Twitter Defendants’ Motion to Dismiss because they are incorporated by reference in Plaintiff’s Complaint and/or subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (court ruling on motion to dismiss securities fraud complaint must consider “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice”); *Bodri v. GoPro, Inc.*, No. 16-cv-00232-JST, 2017 WL 1732022, at \*4 (N.D. Cal. May 1, 2017) (Tigar, J.) (taking judicial notice of documents referenced in securities fraud complaint and publicly available documents); Fed. R. Evid. 201(b)(2) (authorizing judicial notice of facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

Judicial notice is proper because these exhibits support arguments made in the Twitter Defendants’ Reply Memorandum in support of the Motion to Dismiss that respond to arguments raised in Plaintiff’s Opposition brief. *See In re Bank of Am. Corp.*, No. 09-md-02014 JSW, 2011 WL 740902, at \*1 (N.D. Cal. Feb. 24, 2011) (taking judicial notice of exhibits submitted with defendant’s reply brief). Specifically:

- 1       • In the Opposition, Plaintiff assumes that the Q2 2015 decline in the DAU/MAU ratio  
2       must have resulted from a *decline* in average DAUs, as opposed to relatively slower  
3       growth in average DAUs compared to average MAUs. Opp. at 20. Exhibits **S** and **T**  
4       show that the MAU growth rate from Q1 2014 through Q2 2015 was 32%. That  
5       growth rate and the 4% decline in DAU/MAU ratio that Twitter reported in Q2 2015  
6       suggest that DAU also *grew* during that period. See MTD Reply at 3.
- 7       • In the Opposition, Plaintiff argues that Twitter’s Q1 2015 10-Q was “out of the norm”  
8       because it reported automated user data for the fourth quarter of the previous year  
9       rather than for the current quarter. Opp. at 14. Exhibits **T-X** demonstrate that Twitter  
10      in fact reported automated user data for the fourth quarter of the previous year in *every*  
11      quarterly report it issued in 2015 and 2016. See MTD Reply at 10.
- 12      • In the Opposition, Plaintiff argues that Defendants had “no problem accounting for  
13      [DAU], both before and after the Class Period.” Opp. at 13. Exhibits **Y** and **Z** provide  
14      context for how much detail about DAU Twitter provided in its pre- and post-Class  
15      Period earnings calls. Specifically, these earnings calls demonstrate that Twitter’s  
16      Class Period earnings calls were as detailed as, if not more detailed than, disclosures in  
17      other periods. See MTD Reply at 9.
- 18      • In the Opposition, Plaintiff asserts that Defendant Noto described “engagement” as “by  
19      far our number one opportunity” during the 2015 Morgan Stanley Investor Conference.  
20      Opp. at 28. Exhibit **AA** demonstrates that Noto in fact stated that user “retention” was  
21      Twitter’s “number one opportunity.” See MTD Reply at 8.
- 22      • In the Opposition, Plaintiff asserts that “the SEC has opined that providing raw  
23      numbers . . . without appropriate context is misleading.” Opp. at 9 n.4. Exhibit **BB**  
24      provides the appropriate context for the statements Plaintiff references. See MTD  
25      Reply at 9.
- 26      • In the Opposition, Plaintiff argues that DAU is a “standard industry metric.” Opp. at  
27      13. Exhibits **CC-EE**, SEC filings by Facebook and Snap, two companies that Plaintiff  
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cites as Twitter's "social-media peers," demonstrate that social media companies differ in how they measure and report DAU. *See* MTD Reply at 9.

**I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF DOCUMENTS THAT ARE INCORPORATED BY REFERENCE (EXHIBITS Y, AA, AND BB)**

The Court should take judicial notice of Exhibits **Y**, **AA**, and **BB** because, as detailed above, each of those documents has been incorporated into the Complaint by reference. When ruling on a motion to dismiss a securities fraud complaint, courts should "consider the complaint in its entirety," including "documents incorporated into the complaint by reference." *Tellabs*, 551 U.S. at 322; *see also Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008); *Bodri*, 2017 WL 1732022, at \*4. Thus, "[i]f a complaint cites to a document not actually attached as an exhibit, the court may still treat that document as part of the pleading for purposes of evaluating a motion to dismiss." *Philco Invs., Ltd. v. Martin*, No. C 10-02785 CRB, 2011 WL 4595247, at \*7 n.9 (N.D. Cal. Oct. 4, 2011) (citing *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994)); *Cement Masons & Plasterers Joint Pens. Tr. v. Equinix, Inc.*, No. 11-01016 SC, 2012 WL 685344, at \*5 n.4 (N.D. Cal. Mar. 2, 2012) ("Where a plaintiff fails to attach to the complaint the documents upon which the complaint is premised, a defendant may attach such documents in order to show that they do not support the plaintiff's claim."). A court should consider the full text of such documents, even if the complaint itself only quotes selected portions. *See In re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1066 (N.D. Cal. 2010) (where plaintiff "references and relies on a particular document as part of the . . . complaint," the court is "justified in looking outside the four corners of the complaint, to the document itself if offered"). Because the Complaint cites, and in some areas selectively quotes from, Exhibits **Y**, **AA**, and **BB**, the Court should take judicial notice of these documents.

**II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF PUBLICLY AVAILABLE INFORMATION (EXHIBITS S-Z AND BB-EE)**

The Court also should take judicial notice of Exhibits **S-Z** and **BB-EE** because all of these documents are publicly available and thus capable of "accurate[] and read[y] determin[ation] from

sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). In considering motions to dismiss securities fraud complaints, courts routinely take judicial notice of publicly available information about a company “to show disclosure of information.” *In re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964, 980 (N.D. Cal. 2010); *Bodri*, 2017 WL 1732022, at \*4 (taking judicial notice of “matters in the public record,” including SEC filings, and transcripts from earnings calls).

Exhibits **S-X** and **CC-EE** were publicly filed with the SEC, making judicial notice appropriate. *See, e.g., Metzler*, 540 F.3d at 1064 n.7 (“judicial notice [of] publicly available financial documents, including . . . SEC filings . . . [is] proper”); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (SEC filings subject to judicial notice).

Transcripts of Twitter’s earnings calls (Exhibits **Y-Z**) and Chairperson White’s November 2013 Speech (Exhibit **BB**) are also publicly available and thus subject to judicial notice. *See In re Leapfrog Enter., Inc. Sec. Litig.*, 200 F. Supp. 3d 987, 992 & n.1 (N.D. Cal. 2014) (taking judicial notice of company’s “earnings and conference call transcripts”); *SEC v. Mozilo*, No. CV 09-3994-JFW (MANx), 2009 WL 3807124, at \*7 n.2 (C.D. Cal. Nov. 3, 2009) (taking judicial notice of “SEC filings, [and] transcripts of earnings conference calls and investor forums”).

### **CONCLUSION**

The Twitter Defendants respectfully request that the Court take judicial notice of Exhibits **S** through **EE**.

August 7, 2017

SIMPSON THACHER & BARTLETT LLP

/s/ James G. Kreissman  
James G. Kreissman (Bar No. 206740)

*Attorneys for Defendants*  
*Twitter, Inc., Richard Costolo and Anthony Noto*